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SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

FILED

DOCKET NO: ACJC 2008-056

06 2009

CLERK

IN THE MATTER OF CHARLES A. DELEHEY, JUDGE OF THE SUPERIOR COURT	**PRESENTMENT**

The Advisory Committee on Judicial Conduct ("Committee" or "ACJC") hereby presents to the Supreme Court its Findings and Recommendation in this matter in accordance with Rule 2:15-15(a) of the New Jersey Court Rules. The Committee's Findings demonstrate that the charges set forth in the Formal Complaint against Charles A. Delehey, Judge of the Superior Court ("Respondent"), have been proven by clear and convincing evidence. The Committee recommends that the Respondent be publicly reprimanded.

On November 5, 2008, the Committee issued a Formal Complaint in this matter, which contained two primary allegations against the Respondent: (1) that Respondent engaged in an impermissible ex parte conversation in violation of Canon 3A(6) of the Code of Judicial Conduct, as well as Canons 1, 2A and 2B of the Code and Rule 2:15-8(a)(6) of the New Jersey Court

Rules; and (2) that Respondent initiated and participated in plea negotiations in a criminal case over which he was presiding in violation of Canons 1, 2A, 2B, 3A(1) and 3A(6) of the Code of Judicial Conduct and Rule 3:9-3 and Rule 2:15-8(6) of the New Jersey Court Rules. The Respondent filed an Answer to the Complaint on December 3, 2008, in which he admitted certain factual allegations of the Formal Complaint and denied others.

On June 18, 2008, prior to the filing of its Formal Complaint, the Committee conducted an informal conference with Respondent in accordance with Rule 2:15-11. On May 21, 2009, the Committee convened a formal hearing in this matter. Respondent appeared at the formal hearing with counsel and offered testimony in his defense. Exhibits were offered by the Presenter, which were accepted into evidence, as was a set of joint Stipulations agreed to by both parties. See Stipulations of Parties dated March 18, 2009 ("Stipulations").

After carefully reviewing all of the evidence, the Committee made factual determinations, supported by clear and convincing evidence, which form the basis for its Findings and Recommendation.

I. FINDINGS

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1966. At all times relevant to this matter, Respondent was a Judge of the

Superior Court of New Jersey, assigned to the Mercer Vicinage, Criminal Part. Stipulations at ¶¶1-2. Respondent has since retired from the bench.

A. Factual Background

The grievant in this matter, Jeffrey Nemes ("Grievant"), filed a complaint with the ACJC as a result of his appearance before Respondent on August 20, 2007. In March 2007, the Grievant was convicted of bribery and conspiracy following a jury trial conducted by Respondent and was sentenced to prison. Id. at ¶3. On August 20, 2007, while the Grievant was an inmate at the Midstate Correctional Facility in Fort Dix, New Jersey, he appeared before Respondent for a hearing on a motion filed by his attorney to be relieved as counsel. Id.

At the conclusion of the hearing, Respondent invited C. Matthew Nemes ("Matthew Nemes" or "Mr. Nemes"), the Grievant's brother, into his chambers. Id. at ¶4. A conversation commenced between the two individuals, which occurred off the record and without the presence of the prosecutor, defendant, or any other individual. Id.; Tr. 39-3 to 8. During the conversation, Respondent told Matthew Nemes that he had heard "good things" about the Nemes family, and that he recognized that the incident involving the Grievant, which was the subject of additional indictments, must be embarrassing. Id. at ¶4. According to Respondent, his reason for initiating the

discussion with Mr. Nemes was to "ameliorate the hurt" that the Nemes family was experiencing. Id.

Respondent and Mr. Nemes then began to discuss the criminal cases still pending against the Grievant. Id. at ¶5. Respondent agrees he told Matthew Nemes the following information about this topic: (1) that the prosecution had offered the Grievant a concurrent sentence; (2) that the plea deal offered by the prosecution to the Grievant was a "good one;" (3) that the Grievant should take the plea; and (4) that Matthew Nemes should "speak to him [the Grievant] about it [the plea deal]." Id. In his letter to the Committee dated February 28, 2008, Respondent reported he also made the following statement to Matthew Nemes: "Maybe you can convince him otherwise, but if there's one thing I've learned it is that people make decisions for their reasons, not for mine." Id. During Respondent's Informal Conference before the Committee, Respondent stated he told Mr. Nemes that, "... it would seem to me it's in your brother's best interest to take it because if he's convicted at a later date, even if he gets a concurrent sentence, it will be so [sic] along in his first sentence that it'll be - the effect of it will be a consecutive sentence." Id. Respondent further told Matthew Nemes, "[M]aybe you could make some sense to him [the Grievant]." Id.

During the hearing before the ACJC, Respondent admitted making the foregoing comments but explained that it was not unusual for him to discuss a criminal defendant's potential sentence as well as any plea deals offered to ensure the defendant understood the full impact of his/her decisions. Tr. 17-12 to 18-6. Respondent explained, however, that such discussions with defendants were conducted by him "from the bench as a matter of routine," and that both prosecutor and defense counsel would be present. Tr. 18-7 to 9; Tr. 20-19 to 21-1. Respondent insisted that he did not believe he "ever told people that I was recommending the sentence. I was trying to explain it to them, what would happen." Tr. 21-10 to 13.

With regard to his discussion in chambers with Matthew Nemes on August 20, 2007, Respondent admitted that, prior to the discussion's commencement, the prosecutor was present in his courtroom for the return date of the motion filed by the Grievant's attorney. Tr. 32-19 to 23. Respondent testified he asked his sheriff's officer to invite Mr. Nemes back to his chambers after granting the motion in question. Tr. 31-11 to 18. According to Respondent, he initiated the discussion in chambers to explain to Matthew Nemes that the Nemes Family "had my sympathy, or empathy…." Tr. 39-10 to 17. Respondent indicated that Mr. Nemes responded with a comment that "opened the topic of the remaining charges" pending against the

Grievant, which is why Respondent explained the plea deal offered and suggested that the plea offer "seems to me to be fair." Tr. 39-15 to 21. At the time of this discussion, certain criminal cases involving the Grievant were still open matters. Tr. 34-11 to 35-21.

Respondent testified that he would not have had his discussion with Matthew Nemes in open court in front of others as he meant his conversation with Mr. Nemes to be "a personal expression of sympathy," and he did not wish "some people to think that they're really being treated differently than others, or why doesn't the Judge say something nice about our relative who may have committed a gang murder?" Tr. 41-9 to 22.

B. Count I - Ex Parte Conversation with Mr. Nemes

The Committee finds, by clear and convincing evidence, that Respondent violated Canon 3A(6), along with Canons 1 and 2A, of the Code of Judicial Conduct and Rule 2:15-8(a)(6) of the New Jersey Court Rules by initiating and participating in an ex parte conversation with Matthew Nemes. Canon 3A(6) of the Code of Judicial Conduct provides, in pertinent part, that judges "shall neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." Canon 1 requires judges to maintain high standards of conduct so that the integrity and independence of the Judiciary is preserved. Canon 2A directs that judges conduct themselves in a

manner that promotes public confidence in the integrity and impartiality of the Judiciary. Finally, Rule 2:15-8(a)(6) prohibits judicial conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

It is uncontested that Respondent engaged in a conversation with the Grievant's brother in his Chambers without the presence or participation of others on August 20, 2007. This conversation took place at Respondent's initiation and while he was wearing his judicial robes. Although the door to Respondent's chambers was open, no one was present in the room other than Respondent and Mr. Nemes.

While Matthew Nemes was not a party to the proceeding involving his brother, we find that Respondent treated Matthew Nemes as a representative or agent of his brother, the Grievant. By Respondent's own admission, he spoke with Mr. Nemes about the Grievant's criminal cases and, in particular, the charges and plea offer pending. Moreover, Respondent requested that Mr. Nemes speak with the Grievant about the details of their conversation.

Under these facts, the conclusion that Respondent engaged in an impermissible ex parte conversation with Mr. Nemes about pending and impending court proceedings is certain. Although Respondent conducted his conversation with Mr. Nemes and not directly with the Grievant, we find that such conversation had

the same import of having an ex parte conversation with the Grievant himself, especially as Respondent requested Mr. Nemes relay the conversation back to the Grievant. Canon 3A(6) is unequivocal in its prohibition against ex parte conversations. Respondent's subjective view of his participation in the conversation as motivated only by the desire to be helpful and compassionate is therefore immaterial. Respondent's conversation with Matthew Nemes, in the absence of the prosecutor and Grievant, was impermissible and violated Canon 3A(6).

By engaging in an impermissible ex parte conversation about pending and impending proceedings in violation of Canon 3A(6) of the Code of Judicial Conduct, Respondent's conduct likewise violated Canons 1 and 2A of the Code of Judicial Conduct, as well as Rule 2:15-8(a)(6) of the New Jersey Court Rules. Such conduct brings the judiciary into disrepute and reduces public confidence in the judiciary's overall integrity and independence. We do not find a violation of Canon 2B.

C. Count II - Participation in Plea Negotiations

The Committee finds, by clear and convincing evidence, that Respondent engaged in impermissible plea negotiations in a criminal case over which he was presiding in violation of Rule 3:9-3 and Rule 2:15-8(a)(6) of the New Jersey Court Rules and Canons 1, 2A, 3A(1) and 3A(6) of the Code of Judicial Conduct.

Rule 3:9-3(a) is clear on its face: "The prosecutor and defense counsel may engage in discussions relating to pleas and sentences and shall engage in discussions about such matters as will promote a fair and expeditious disposition of the case, **but except as hereinafter authorized the judge shall take no part in such discussions.**" (Emphasis supplied.) The exception to the foregoing mandate is found in Rule 3:9-3(c) but is narrowly tailored:

> On request of the prosecutor and defense counsel, the court in the presence of both counsel may permit the disclosure to it of the tentative agreement and the reasons therefor in advance of the time for tender of the plea or, if no tentative agreement has been reached, the status of negotiations toward a plea agreement. The court may then indicate to the prosecutor and defense counsel whether it will concur in the tentative agreement or, if no tentative agreement has been reached and with the consent of both counsel, the maximum sentence it would impose in the event the defendant enters a plea of guilty, assuming, however, in both cases that the information in the presentence report at the time of sentence is as has been represented to the court at the time of the disclosure and supports its determination that the interests of justice would be served thereby.

Rule 3:9-3(c). Consequently, a judge's involvement in plea discussions must occur not only in the presence of both the prosecutor and defense counsel but only if both the prosecutor and defense counsel request the judge's participation. If these

two criteria have been met, the judge may then express his/her views of a tentative plea deal already reached by the prosecutor and defendant or, if no tentative agreement has been reached, the judge can relay to the defendant the maximum sentence that is faced.

The prohibition against a judge's involvement in negotiating or suggesting terms of a plea agreement is long-standing and, although subject to some debate in the past, unchanged. See State v. Williams, 277 N.J. Super. 40, 48 (App. Div. 1994) ("Because a judge may not participate in plea negotiations, a judge may not tender a plea offer, especially over the objection of the prosecutor. Various courts have observed that such action improperly assumes the executive or prosecutorial power and, therefore, violates the doctrine of separation of powers."); State v. Korzenowski, 123 N.J. Super. 454, 456 (App. Div.) ("As to defendant's contentions referable to the absence of participation by the court in the bargaining procedure, there is clear authority mandating nonparticipation."), certif. denied 63 N.J. 327 (1973); State v. Thomas, 61 N.J. 314, 321 (1972) ("Prosecutor and defense counsel may enter into these discussions concerning pleas and sentences; in these discussions the judge must take no part."); State v. Louis, 112 N.J. Super. 374, 379 (App. Div. 1970) (noting N.J. Supreme Court case approving plea negotiations was limited to "discussions 'between

the prosecutor and defendant and his attorney.' It does not contemplate that the judge should either initiate these discussions or participate therein. Moreover, there is strong authority forbidding a trial judge's participation in plea discussions.").

The heart of the stricture enjoining judges from initiating or engaging in plea negotiations is the preservation of judicial impartiality, independence and integrity. As observed by then retired Burlington County Assignment Judge Haines in discussing a proposed rule change to the rule on plea bargaining, the existing Rule limiting a trial court's participation in plea bargaining protects "judicial independence and impartiality." Honorable Martin L. Haines, "Remove Judges From Plea-Bargaining Process," 175 N.J.L.J. 1295 (March 29, 2004). The threat created by the involvement of judges in plea negotiations, as noted by Judge Haines, is serious: "Judges, consciously or unconsciously, will adopt conclusions about issues, producing biased tribunals in the likely event plea-bargaining judges become trial judges." Id. Obviously, the need for a judge to maintain his/her impartiality and objectivity in judicial matters, in both reality and appearance, and the related need to comply with the Rules of Court that are binding upon judges, are vital to the safeguarding and integrity of our judicial system. See Canon 2A of the Code of Judicial Conduct ("A judge should

respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

In this matter, Respondent readily admitted to presenting his personal assessment of the plea deal offered to the Grievant to Mr. Nemes. In Respondent's own words, he suggested to Matthew Nemes that he found the plea offer to be "good" and "fair." Such assessment occurred in the context that Respondent would be the presiding trial judge if the proposed plea was rejected. Respondent indicated that Mr. Nemes might wish to talk "some sense" into his brother regarding the merits of the plea deal. This conversation did not take place in the presence of the prosecutor. The defendant, who at the time was no longer represented by counsel, likewise did not participate in the conversation.

Despite the clarity of the Rule in question and interpreting case law, Respondent does not believe that his behavior was in any way inappropriate: "As I see it, I've done nothing wrong. I have done nothing to be ashamed of. I think I did the right thing. That may be viewed as a lack of contrition, or a lack of remorse, or maybe even arrogance, but it's the way that I feel about this circumstance. And I know that those who would look at my words, the cynic will always see something that's evil or wrong. The skeptic will always have doubts. The average

person, I think, should understand what happened." Tr. 47-13 to 21. Respondent offered that, in his view, the extended and protracted history of the Grievant's various criminal matters and the harm the Grievant caused to others should be a factor in the Committee's review of the matter and its decision regarding whether he violated the Court Rules and Code of Judicial Conduct. Respondent submitted that even if there was something improper about what he did, it was of a "de minimis" nature. Tr. 44:7 to 10.

We find that Respondent violated Rule 3:9-3(a) by substantively evaluating and promoting the plea deal offered the Grievant to Mr. Nemes, the Grievant's brother, outside of the presence of the prosecutor and defendant. What the Respondent describes as de minimis and acceptable is completely contrary to the Rules of Court to which Respondent was bound. Rule 3:9-3(a) mandates that judges "shall take no part" in plea discussions or negotiations with certain limited exceptions. Such exceptions are only triggered when the judge's participation is requested by both the prosecutor and defense counsel and when such participation takes place in their presence. Neither of those conditions occurred in this case nor did the other prerequisites expressed in the Rule. By doing so, Respondent substantially crossed the line prohibited by the Rule.

Moreover, at the time that Respondent conveyed his personal endorsement of the plea deal offered to the Grievant, he had jurisdiction over open and pending criminal cases involving the Grievant. We believe that Respondent's personal assessment and his vigorous endorsement of the plea deal offered by the prosecutor created the appearance that Respondent was not impartial. By creating that appearance, Respondent's conduct violated his paramount obligation under Canon 2A of the Code of Judicial Conduct to remain neutral, impartial and objective.

By violating Rule 3:9-3(a) and Canon 2A, Respondent's conduct also violated Canons 1, 3A(1) and 3A(6) of the Code of Judicial Conduct and Rule 2:15-8(6) of the New Jersey Court Rules. We do not find a violation of Canon 2B.

II. RECOMMENDATION

The Committee recommends that Respondent be publicly reprimanded. The Committee finds Respondent's deliberate violations of the pertinent Canons and Rules of Court, and his inability to understand and accept the impropriety of such violations, to be serious and disquieting. Nevertheless, we are cognizant of Respondent's twenty-one years of exceptional service to the trial court of New Jersey. We likewise recognize that Respondent is now retired from the bench after his extended service to this State.

For these reasons, the Committee respectfully recommends that Respondent be publicly reprimanded for the conduct at issue in this matter.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

August 6, 2009 By: Alan B. Handler /jmw
Alan B. Handler, Chair